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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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Harold Edward Price

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7590

05/24/2010

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EXAMINER

BLAIR, DOUGLAS B

ART UNIT

PAPER NUMBER

2442

MAIL DATE

DELIVERY MODE

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PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.



## **DETAILED ACTION**

### ***Response to Amendment***

The applicant's amendment submitted on 11/2/2009 featured new claims 17-59. In the applicant's arguments filed on 2/16/2010, the applicant argued that, "By way of contrast, the approach inherent in applicant's new claims 17-59 like that of previous claims 7-16, relies on feedback indicative of the state of the user buffer to adaptively adjust the data transmission rate." (Page 7 of the 2/16/2010 remarks). Though the previous claims set was explicitly directed towards feedback, the applicant has now cancelled these limitations from the independent claims. After carefully reviewing the new claims and the applicant's specification, it appears the applicant is now claiming two mutually exclusive species; the first using pointers at the server side to track buffer progress (claims 22, 37, and 50) and the second using user computer feedback to track buffer progress (claims 23, 38, and 51). Page 12 and specifically the statement beginning on line 21 of the applicant's specification make it clear that these are mutually exclusive embodiments. Now the independent claims must be searched in two mutually exclusive contexts, doubling the burden of the search. Restriction is now required.

### ***Election/Restrictions***

This application contains claims directed to the following patentably distinct species: claims 22, 37, and 50 involve maintaining a pointer to track buffer progress at a server whereas claims 23, 38, and 51 are directed towards receiving identifiers from user computers to track the buffer progress. These two sets of claims are mutually exclusive according to page 12, line 21 of the applicant's specification. The species are independent or distinct because claims to the

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different species recite the mutually exclusive characteristics of such species. In addition, these species are not obvious variants of each other based on the current record.

Applicant is required under 35 U.S.C. 121 to elect a single disclosed species for prosecution on the merits to which the claims shall be restricted if no generic claim is finally held to be allowable. Currently, claims 7-21, 24-36, 39-49, and 52-59 are generic.

There is an examination and search burden for these patentably distinct species due to their mutually exclusive characteristics. The species require a different field of search (e.g., searching different classes/subclasses or electronic resources, or employing different search queries); and/or the prior art applicable to one species would not likely be applicable to another species; and/or the species are likely to raise different non-prior art issues under 35 U.S.C. 101 and/or 35 U.S.C. 112, first paragraph.

**Applicant is advised that the reply to this requirement to be complete must include (i) an election of a species to be examined** even though the requirement may be traversed (37 CFR 1.143) **and (ii) identification of the claims encompassing the elected species**, including any claims subsequently added. An argument that a claim is allowable or that all claims are generic is considered nonresponsive unless accompanied by an election.

The election of the species may be made with or without traverse. To preserve a right to petition, the election must be made with traverse. If the reply does not distinctly and specifically point out supposed errors in the election of species requirement, the election shall be treated as an election without traverse. Traversal must be presented at the time of election in order to be considered timely. Failure to timely traverse the requirement will result in the loss of right to

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petition under 37 CFR 1.144. If claims are added after the election, applicant must indicate which of these claims are readable on the elected species.

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the species unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other species.

Upon the allowance of a generic claim, applicant will be entitled to consideration of claims to additional species which depend from or otherwise require all the limitations of an allowable generic claim as provided by 37 CFR 1.141.

### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to DOUGLAS B. BLAIR whose telephone number is (571)272-3893. The examiner can normally be reached on 9:00am-5:30pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Philip Lee can be reached on (571) 272-3967. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Douglas B Blair/  
Primary Examiner, Art Unit 2442